

# ARBITRATION ADVISORY

1993-01

## AWARDS OF INTEREST BY THE ARBITRATOR

July 30, 1993

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### INTRODUCTION

This is intended to summarize existing law on the awarding of interest as part of the fee arbitration award (the "Award"), including when interest may be awarded and the method of calculating interest. This does not apply to situations where the attorney is retained by the client on a contingency fee basis.

### ANALYSIS

**1. May interest be awarded as part of the Award? Yes.**

Business & Professions Code ("B&PC") Sections 6200-6206 provide for the arbitration of fee disputes between attorneys and their clients. Attorneys are required to arbitrate fee disputes when timely requested by the client [B&PC Section 6200(c)]. The arbitrators may resolve all disputes concerning fees, costs or both.

The fee arbitration statutes do not mention an award of interest. Nor do they preclude an award of interest. The statutes specify circumstances when fee arbitration is not available (for instance when fees are awarded pursuant to statute or court order - B&PC Section 6200(b)(3)) and preclude the recovery of certain types of damages (for instance, attorneys' fees cannot be awarded to either party - B&PC Section 6203(a)). Since the arbitration statutes carefully define those situations when arbitration is available and preclude certain elements of damages, any elements of damages not specifically precluded which are otherwise recoverable at law may be included in the Award.

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . ." [CCP § 3287(a)]. "The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon." [CCP § 3302].

## **2. May interest be awarded regardless of the existence of a written contract?**

Where a useful service of a kind usually charged for is performed for another with the latter's knowledge, a promise to pay its reasonable value may be implied from the fact that the recipient avails him or herself of the service [Gray v. Whitemore (1971) 17 Cal.App.3d 1, 24]. Moreover, where services are rendered by one from which another derives benefit, a presumption of law arises that the person enjoying the benefit is bound to pay what they are reasonably worth [Meredith v. Marks (1963) 212 Cal.App.2d 265, 272]. There is an implied agreement on the part of a client to pay for services and advances of the client's counsel; no agreement in so many words is necessary [Pierce v. Kalmus (1955) 133 Cal.App.2d 437, 439].

When an attorney performs services with the client's knowledge that are useful to the client and are services that are generally charged to the client, an implied agreement is created requiring the client to pay the reasonable value of the services therein rendered [Gray v. Whitemore, supra].

The right to recover interest for breach of contract is not predicated on the existence of a written contract. In fact, the Civil Code does not distinguish between a written agreement, oral agreement or implied agreement for purposes of the right to recover interest [CCP §§ 3287 and 3302]. Therefore, the arbitrators may award interest as part of any Award (whether to the attorney for money owed or the client for a refund on fees already paid) regardless of the existence of a written agreement or an express oral agreement.

Where B&PC §6148 requires a written agreement, but there is no written agreement, or where the attorney is proceeding on quantum meruit, whether or not interest may be awarded is subject to differing interpretations of the authorities. *Marine Terminals Corp v. Paceco, Inc.*, (1983) 145 Cal.App.3d 991 can be read to support an award of interest where, as noted above, the invoices are reasonably accurate and sufficient to apprise the client of the amount the attorney seeks to recover and the amount billed is not significantly different from the award. On the other hand, some cases under Civil Code Section 3287 do not allow prejudgment interest where the amount of damages can be resolved only by account, verdict or judgment [*Stein v. Southern California Edison Company* (1992) 7 Cal.App.4th 565, 573]. In *Fitzsimmons v. Jackson* (BAP, 9th Cir. 1985) 51 B.R. 600, 612-613, the court denied prejudgment interest to an attorney because the basis of the attorney's claim was quantum meruit. The court cited *Parker v. Maier Brewing Company* (1960) 180 Cal.App.2d 630, 634 for the proposition that where there is no express contract and the action is for quantum meruit to recover the reasonable value of services rendered, prejudgment interest is not recoverable.

When there is no written agreement, interest shall only be awarded when the principal damages are readily ascertainable within the meaning of Civil Code Section 3287 [*Macomber v. State of California* (1967) 250 Cal.App.2d 391, 400]. As long as the principal amount owing can be calculated from statements rendered by the attorney, interest should be awarded [*Macomber v. State of California*, supra at 401]. This is true even if the client disputes the fees. As long as the invoices are reasonably accurate, in compliance with B&PC Section 6148(b) and sufficient to apprise the client of the amount the attorney seeks to recover, then the damages are readily ascertainable [*Marine Terminals Corp. v. Paceco, Inc.* (1983) 145 Cal.App.3d 991, 998].

Arbitrators considering an award of interest in these situations are urged to consult these authorities and any authorities published after the date of this advisory to resolve these issues.

### **3. What rate of interest should be used and how should interest be calculated?**

When there is no written agreement which specifies a rate of interest, the arbitrators shall award simple interest at the rate of 10% per annum from the date of breach [CCP § 3289(b)].

When there is a written contract which specifies the rate of interest, then the rate set forth in the contract shall apply [CCP § 3289(a)].

Interest should be awarded from the date of breach through the date of the Award [CCP § 3289]. The date of breach is a question of fact primarily based on when the obligation was due. Frequently, the written fee agreement will provide when the obligation is due or on what date a breach is deemed to occur.

In calculating interest, absent a written agreement providing for the compounding of interest, the obligation shall bear simple interest. Without an express written agreement to the contrary, "[t]he compounding of interest has not been approved, legislatively or judicially, in this state." [State of California v. Day (1946) 76 Cal.App.2d 536, 554].

To summarize, if there is no written agreement which specifies a rate of interest, then the arbitrators may award interest of 10% per annum from the date of breach through the date of the Award. Interest shall be calculated by multiplying the principal amount of the Award by 10%, dividing that number by 365 days (1 year) and then multiplying the resulting number by the number of days which have elapsed from date of breach until date of the Award (e.g., attorney has a written fee agreement which specifies that all fees are to be paid within 30 days of invoice date. No interest rate is specified in the fee agreement. Attorney invoices client monthly on the first day of each month. On May 1, 1992, attorney sent client an invoice for \$3,000. Client has never paid any part of the invoice. The Award is in the sum of \$3,000.00 in favor of attorney and the arbitrators determine attorney was entitled to be paid by May 31, 1992, and a default occurred on June 1, 1992. The Award is prepared on April 30, 1993. Therefore, 334 days have elapsed between June 1, 1992 and April 30, 1993. Interest is calculated by multiplying \$3,000.00 times 10% (\$300.00), dividing that number by 365 days (.8219) and multiplying that number by 334 days (\$274.52). Therefore, the arbitrators will include in the Award the principal sum of \$3,000 and interest of \$274.52.)

### **4. What happens in circumstances when there is a written fee agreement which provides for interest at a rate other than 10% per annum?**

Civil Code Section 3289(a) provides that parties may contract to any "legal rate of interest." Reference to the phrase "legal rate of interest" is not to a rate of 10% per annum but rather to any interest rate which is legally collectible under California law. If the rate specified in the written agreement is 10% per annum or less, the arbitrators should award the contract rate of interest.

If the rate of interest specified in the written agreement is greater than 10% per annum and the services rendered were for business (rather than personal), then the arbitrators may award the specified rate of interest (regardless of the amount as long as the rate is not unconscionable) [Southwest Concrete Products v. Gosh Construction Corp. (1990) 51 Cal.3d 701].

If the written agreement specifies a rate of interest in excess of 10% per annum and the services rendered were personal (rather than business), we recommend, due to the difficulty of determining the application of existing federal and state laws, that the arbitrators award simple interest at the rate of 10% per annum consistent with Civil Code Section 3289(b). This recommendation is not based on an opinion that a rate of interest specified in excess of 10% per annum is improper, illegal or otherwise uncollectible. Rather, the recommendation is based on the difficulty in determining on a case-by-case basis whether the attorney is required to comply with federal (Truth In Lending Laws) and state (Unruh Act) statutes. When these statutes are not applicable, the attorney should be able to recover any rate of interest specified in a written agreement which is otherwise not unconscionable. When these statutes do apply, the attorney can only recover interest if the attorney has complied with the statutes.

### **CONCLUSION**

In any civil action based on a contract (express or implied) the prevailing party is generally entitled to recover interest from the date the underlying debt became due until either entry of judgment or the date paid. Nothing in the fee arbitration statutes limit the awarding of interest. Therefore, the arbitrators may award interest from the date of breach through the date of the Award. Unless the written agreement provides for compounding of interest, the obligation should bear simple interest. The interest rate should be 10% unless there is a written agreement which provides otherwise and, in such circumstance, the written contract rate should apply. In circumstances where there is a written contract rate in excess of 10% and the services rendered are for personal purposes rather than for business, the arbitrators may wish to award interest at the rate of 10% per annum.